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Chairman, The Federal Trade Commission

"Promoting a Culture of Competition"

April 10, 2006

Thank you. I am delighted to be in Beijing and to address you today. This is my first trip to China as Chairman of the U.S. Federal Trade Commission ("FTC"), and I am grateful for the opportunity to appear before you today.

The Federal Trade Commission has a vital role to play in speaking for reliance on market processes and standing up for consumer interests. We aspire to develop policies that recognize and take advantage of the remarkable consumer benefits inherent in the largely decentralized economic organization that is the U.S. market system. Our policy goal is to enhance consumer welfare, not to protect small competitors from large competitors or to shelter domestic producers from foreign competition, and thus, we channel our energies toward challenging conduct that injures consumers. We also strive, through "competition advocacy," to create a culture of competition in which federal and state policymakers, courts, and the public come to understand and support competition policy as the best way to protect consumers and promote economic growth.

I. Why Competition Advocacy Is Necessary

Typically, the market system works well, and companies compete fiercely but fairly against each other, to the ultimate benefit of consumers. At times, however, private or

[1] The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

government actions operate to thwart competition. Pure anticompetitive business conduct, such as cartels, anticompetitive mergers, and other anticompetitive practices can have harmful effects on competition and thus on consumers. When faced with these infrequent problems, our task is clear: we take enforcement action against this kind of private anticompetitive behavior under the antitrust laws.

We have been, for example, particularly active in the health care and pharmaceutical markets. Last year, the Commission investigated a transaction between Johnson & Johnson and Guidant, which had it gone forward, would have reduced competition in the markets for three life-saving medical devices for coronary artery disease patients. In another merger investigation, we entered an order that protects patients who require dialysis services from higher prices and reduced quality and service.[2] The FTC also brought and settled several cases charging groups of physicians with engaging in illegal agreements to set the prices they will accept from health insurance plans.[3] Finally, just last month, the Commission approved a settlement agreement that

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[2] Davita, Inc., FTC No. C-4152 (Decision and Order) (Nov. 14, 2005), *available at* http://www.ftc.gov/os/caselist/0510051/051118do0510051.pdf.

[3] In the Matter of Healthcare Alliance of Laredo, FTC No. 041 0097 (Decision and Order) (Feb. 13, 2006), *available at* http://www.ftc.gov/os/caselist/0410097 /060213do0410097.pdf; In the Matter of New Millennium Orthopaedics, LLC, FTC No. C-4140 (Decision and Order) (June 13, 2005), *available at* http://www.ftc.gov/os/caselist/0310087 /050617do0310087.pdf; In the Matter of Partners Health Network, Inc., FTC No. C-4149 (Decision and Order) (Sept. 19, 2005), *available at* http://www.ftc.gov/os/caselist/0410100 /050923do0410100.pdf; In the Matter of Preferred Health Services, Inc., FTC No. C-4134 (Decision and Order) (Apr. 13, 2005), *available at* http://www.ftc.gov/os/caselist/0410099 /050419do0410099.pdf; In the Matter of San Juan IPA*, Inc.*, FTC No. C-4142 (Decision and Order) (June 30, 2005), *available at* http://www.ftc.gov/os/caselist/0310181 /050705do0310181.pdf; In the Matter of White Sands Healthcare Systems, L.L.C., FTC No. C-4130 (Decision and Order) (Apr. 13, 2005), *available at* http://www.ftc.gov/os/caselist /0310135/050114do0310135.pdf.

allowed Teva Pharmaceutical Industries Ltd. to acquire IVAX Corporation after the companies agreed to sell the rights and assets needed to manufacture and market 15 generic pharmaceutical products, including several types of widely-used antibiotics.[4]

Our own governments, though, even if well-intentioned, may adopt regulations that have similar anticompetitive effects. Our role in these situations is more complicated because we typically cannot enforce the antitrust laws against anticompetitive conduct that is clearly authorized and actively supervised by the government. Today, I will focus on why government inhibitions on competition are particularly troubling, why they are an attractive avenue for businesses who want protection from competition, and how we try to combat these restrictions through persuasion, when we cannot reach them through enforcement.

The idea of competition as a way to organize an economy often must struggle against other regulatory structures that are hostile to free markets. For example, in the 1970s, the U.S. economy was not strong, and some observers suggested that excessive government regulation was partially responsible. One such observer was the then-Chairman of the Federal Trade Commission, Lewis Engman, who in 1974 gave a speech in which he tied some of the country's economic problems to its competition policy, specifically to burdensome federal transportation regulations. Engman discussed how the Civil Aeronautics Board raised prices for air travel by limiting the entry of new air carriers and controlling the distribution of airline routes. He also noted that the Interstate Commerce Commission effectively sanctioned price fixing among trucking companies. Engman then concluded that the country's lack of sound competition policy

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[4] Teva Pharmaceutical Industries, Ltd., Docket No. C-4155 (Decision and Order) (May 7, 2006), *available at* http://www.ftc.gov/os/caselist/0510214/0510214do060307.pdf.

led to higher transportation costs, which in turn hurt the U.S. economy overall.

Engman's speech suggested improving competition policy as a way to address the country's economic woes, and, during the next decade, through speeches and formal written submissions to regulatory agencies and legislative committees, the Commission aggressively pursued competition advocacy to promote deregulation of airlines, railroads, trucking, and inter-city buses. The Commission's activity was part of a broader push to deregulate the transportation sector, and scholars estimate that transportation deregulation improved consumer welfare by more than $50 billion annually. At the same time, the courts also undertook a re-evaluation of some antitrust doctrines that had prevented certain kinds of efficient and beneficial business conduct. Although it is difficult to quantify the impact of competition advocacy on this outcome, I believe that it is fair to conclude that the Commission's advocacy, joined by the Justice Department ("DOJ"), helped create a policy climate in the late 1970s and early 1980s that favored liberalizing transport regulation.

Clearly, competition advocacy can promote measures that enhance the vitality of market forces and improve consumer welfare. Its role is not limited to questioning outmoded government regulatory structures, however. It also includes helping policymakers identify and resist attempts by private parties to obtain government action that further their own interests at the expense of competition and consumer interests.

Successful FTC and Justice Department efforts to oppose private trade restraints have increased the appeal to some entities of pursuing public measures to protect them from the competitive forces of the free market. Engaging in private anticompetitive conduct is risky for firms: predatory pricing requires the predator to lose profits in the short term; collusive behavior

has the risk of cheating on the cartel; and there is the risk of detection and legal punishment. By contrast, persuading the government to adopt an anticompetitive restriction is much less risky: the costs of lobbying are low; the government enforces the restriction, which reduces the likelihood of cheating; and the ability of the competition agencies to intervene is limited.

Some producers cloak their requests for anticompetitive government action as consumer protection but, in reality, they are looking for a dispensation from market forces and a reduction in consumer choice. Their real objective is to protect their own pocketbooks, not to protect consumers. In our experience, the relationship between the restriction and the purported consumer protection benefit is often poorly defined. For example, the FTC has commented on requirements that only a licensed eye care provider can sell replacement contacts via the Internet have been touted as protecting consumers.[5] What proponents of such measures failed to mention was that, as long as the lenses are sold pursuant to a valid prescription, there is no extra benefit to the consumer from having an eye care provider oversee putting the prescribed lenses in the shipping box. There was, however, an extra expense of having a licensed professional perform this work and a reduction in competition from non-practitioner replacement lens sellers.

If the costs to competition are great and the benefits to consumers small, how can this be a successful strategy for companies to convince the government to adopt these restrictions? Can't legislators and other policymakers easily detect this imbalance between a regulation's benefits and its costs? The answer lies in the fact that the interests of the companies and the interests of the consumers are typically not well-balanced in this situation. The businesses who

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[5] *See* Comments by the FTC and the Department of Justice on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm.

support these restrictions are usually well organized, have lobbyists with access to lawmakers, and have strong incentives to get the restriction enacted because they will reap all of the supracompetitive returns. By contrast, consumers who would be harmed by the restriction are often unlikely to know about it, are poorly organized, and have limited incentives to stop the restriction because it may only cost any individual consumer a small amount of money, even though it costs consumers a large amount in the aggregate. This is why consumers and competition need champions.

Whether behind the scenes or publicly, the FTC, often in cooperation with the DOJ, continually advises federal and state legislatures, other federal agencies, and courts about the likely effects of their actions on consumers and markets. This activity can nip a restriction on competition "in the bud" before it can blossom into something harmful for consumers. My flower metaphor may be misleading, however, because once enacted, these restraints are far hardier than any blossom. More like weeds, government-imposed restrictions are among the most effective and durable restraints on competition. The government actually enforces the anticompetitive restrictions and they are resistant to erosion by market activity.

Our recent advocacy filings have had two primary aims, (1) facilitating entry, and (2) making it easier for consumers to get useful information. Although the first is a traditional antitrust concern and the second is a traditional consumer protection topic, both are ultimately aimed at encouraging competition and promoting consumer choice.

II. Opposing Unnecessary Barriers to Entry

Much of our activity involves commenting on state and federal regulations or legislation that erect barriers to entry. Often the rationale for legislation is the protection of consumers

through restrictions on who may offer certain goods and services to consumers or (perhaps more honestly) the protection of traditional businesses by sheltering them from new forms of competition. While firms generally profess a desire to keep government from interfering with business, the instinct to seek protection from government is widespread. As one commentator put it, "calls to restrict competition, through government regulations and import barriers, are understandable – and usually wrong."[6]

When evaluating barriers to competition, the FTC uses a careful analytical approach that considers the costs and benefits to consumers and relies on empirical evidence. We ask three basic questions:

First, what specific harm to consumers is the barrier designed to address? The Commission looks for empirical evidence of consumer harm. Because states may vary in the degree to which they regulate these activities, we often look for evidence of consumer harm occurring in states that allow the practice in question.

Second, is the proposed restriction appropriately tailored to address that harm? In endeavoring to answer that question, we look at whether, in addition to the activity the restriction attempts to prevent, it will curtail pro-competitive activity.

Third, does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition? Here, we help to perform the cost-benefit analysis that all policymakers should undertake, emphasizing that competition generally is more successful at protecting consumers than government regulation.

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[6] Robert J. Samuelson, *Competition's Anxious Victory*, WASHINGTON POST, Feb. 2, 2005, at A-23.

A. Barriers to Internet commerce: Wine

In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.[7] Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states, however, have banned or severely restricted the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online.

The FTC staff report, reflecting the interest and sensitivity of the Commission to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. The report supported this conclusion with a study conducted by FTC economists, which showed that many wines available to consumers online are not available in local retail outlets and that consumers could save money if they purchased their more expensive wines online.[8]

The report also examined concerns about the direct shipment of wine to consumers, given

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[7] POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, REPORT OF THE STAFF OF THE FTC (Jul. 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[8] The study appears as an appendix to the FTC staff report. It was published separately as an FTC Bureau of Economics Working Paper, Alan E. Wiseman and Jerry Ellig, How Many Bottles Make a Case Against Prohibition? (Mar. 2003) (FTC Bureau of Economics Working Paper No. 258), and later published as Alan E. Wiseman and Jerry Ellig, *Marketing and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia,* 6:2 Business and Politics 5 (2004), *available at* www.bepress.com/bap/vol6/iss2/art4. The authors explicitly note that a full welfare analysis of the removal of restrictions would require additional data.

that underage drinking is a serious health and safety issue.[9] The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that, in fact, some states have successfully followed this less restrictive approach.

The issue of whether states could prohibit out-of-state sellers from shipping wine to consumers while allowing in-state wine producers to do so ultimately came before the U.S. Supreme Court. The Supreme Court struck down two state bans on the interstate direct shipping of wine and, in doing so, relied heavily on the FTC's wine report, particularly its analysis to determine whether such restrictions were necessary.[10] Several states are now considering whether to change their laws in light of the Court's decision.

III. Advocating The Provision Of Truthful Information

Just as consumers are well-served by markets in which efficient entry is not deterred, they generally also are well-served by maximizing the amount of truthful information that markets can provide. Consistent with this goal, the Commission strives to stop deception without imposing unduly burdensome restrictions that might discourage the provision of information useful to consumers in making purchasing decisions.[11] Because dissemination of truthful and non-

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[9] If the restrictions on direct sale of wine to consumers are motivated by concerns about underage drinking, it is curious that many of the states direct their restrictions only at out-of-state vendors, while allowing direct intrastate shipments from in-state vendors.

[10] *Granholm v. Heald*, 544 U.S. 460 (2005).

[11] *See, e.g.,* FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 31000, 31000 (Aug. 2, 1984) ("The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim."). These factors include consideration

misleading information about products and services is also critical for competition, the Commission has been vigilant in preventing overly broad private and government restrictions on the provision of such information.[12] An approach that encourages the dissemination of accurate speech and tailors restrictions to prevent claims that are false or misleading, coupled with vigorous law enforcement, will result in greater dissemination of valuable information with benefits for both consumers and competition. In contrast, evidence indicates that broad restrictions on the dissemination of truthful commercial speech, while effectively stopping false or misleading information, can deprive consumers of useful information as well, thus impeding their ability to make informed choices in the marketplace. [13]

For example, comparative advertising claims can be particularly beneficial for consumers. The FTC, after conducting an extensive economic analysis, has concluded that comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchasing decisions. Comparative advertising encourages

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of the benefits of a truthful claim and the costs of a false or misleading claim, thus expressly balancing the goal of preventing deception with the need to ensure access to truthful information and vigorous competition. *Id.*; *see also* John E. Calfee & Janis K. Pappalardo, FTC BUREAU OF ECONOMICS, HOW SHOULD HEALTH CLAIMS FOR FOODS BE REGULATED? AN ECONOMIC PERSPECTIVE, ECONOMICS ISSUES PAPER 35 (1989).

[12] *See, e.g., American Medical Association*, 94 F.T.C. 701, 993-96 (1979), *enforced as modified*, 638 F. 2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided court*, 455 U.S. 676 (1982) (challenge to the American Medical Association's prohibition on physician advertising).

[13] *See* Comment of the Staff of the Federal Trade Commission to the FDA on First Amendment Issues (Sept. 13, 2002), *available at* http://www.ftc.gov/os/2002/09 /fdatextversion.pdf.

product improvement and innovation, and can lead to lower prices in the marketplace.[14]

A. Food Health Claims Information

Government regulatory policies can affect the nature and extent of health information that consumers receive about food products. In the food and nutrition sector, we have advocated allowing manufacturers to provide more accessible and useable information to consumers. While we oppose unnecessary mandates, we want to ensure that the FTC and other government agencies, in the name of protecting consumers, do not block producers' incentives or ability to provide useful information to consumers and to compete on important nutritional attributes of their products.[15]

We have worked closely with the U.S. Food and Drug Administration on food regulation issues involving health claims and nutritional information. This is an important area in which regulators should strive to retain producer incentives to improve their products on health qualities and be mindful that those incentives remain strong only if producers can tell consumers about the benefits of any product improvements.[16] Making versions of good-tasting foods is expensive and

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[14] FTC Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15(b).

[15] No one should misread my comments to say that I think markets solve all information problems. Clearly, they will not.

[16] For example, current FDA regulations require that foods have a 25% reduction of fat or calories before they can be labeled as a light or reduced product. For certain foods, however, this level reduction would make the food unpalatable. Depending on the product, 10 or 20% reductions may still be a substantial improvements in the product's healthfulness, but manufacturers lack the incentive to make such changes if they cannot inform consumers about them. Comments of the FTC Staff Before the FDA In the Matter of Obesity Working Group (Dec. 12, 2003), *available at* http://www.ftc.gov/be/v040003text.pdf.

risky. If producers cannot tout their advances in these areas, they will have little incentive to make the investments and take the risks.

B. Direct-to-Consumer Drug Advertising

In another example of FTC advocacy on mandated information disclosure, FTC staff filed a comment with the FDA regarding direct-to-consumer (DTC) advertising of prescription drugs.[17] The comment analyzed the economic effects of such advertising and suggested changes to the FDA's regulatory scheme to communicate information to consumers in a more accessible way. Thereafter, the FDA issued several draft guidance documents designed to improve the information that consumers and health care practitioners receive in advertising about prescription drugs and certain medical devices. The FDA chose to permit advertisers to convey more limited and focused disclosure in DTC print advertisements for prescription drugs and to apply less burdensome regulatory standards to DTC broadcast ads for restricted medical devices. The FDA's decisions conform to the FTC staff's recommendations to allow advertisers to communicate information to consumers in a more accessible way.

VI. Advocating The Sound Development Of The Antitrust Laws

Two primary characteristics of the U.S. legal system give rise to the need also to engage in competition advocacy: first, our common law system, through which courts develop the law through individual case decisions; and second, our system of private antitrust enforcement,

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[17] Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* http://www.ftc.gov/be/v040002text.pdf; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf.

through which private parties can bring claims of anticompetitive conduct against one another. Because private actions can present interesting legal questions that impact development of the antitrust laws, the FTC and DOJ often have a strong interest in those cases and, indeed, U.S. Supreme Court and the federal appellate courts often seek our views in such cases.

One such case was the recently-issued decision by the Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*[18] The case arose from a requirement of a printing system manufacturer that customers of its patented system agree to refill the system only with its unpatented ink. A competing seller of ink, alleged that these agreements constituted illegal tying and that the manufacturer's patents conferred market power sufficient to render the restriction an automatic antitrust violation. A federal appeals court concluded that Supreme Court precedent compelled it to hold that the manufacturer's patent gave rise to a presumption of market power. The FTC, along with the DOJ, submitted a joint *amicus* brief urging the Supreme Court to rule that market power is not presumed where the sale of an unpatented product is tied to the sale of a patented product. In a nutshell, we argued that such a presumption of market power is contrary to modern tying law and current economic learning. Justice Stevens, writing for a unanimous Court, in fact, ruled as the FTC had suggested.

V. The Effectiveness Of The Advocacy Efforts

As with all of our work, it is important that we continually evaluate the benefits of the advocacy program to the U.S. taxpayers who employ us. In 1989, the American Bar Association observed, in a report on the FTC, "Because ill-advised governmental restraints can impose

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[18] 126 S. Ct. 1281 (2006).

staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget."[19] In fact, our advocacy program uses a very small percentage of our budget[20], costing far less, we believe, than the savings to consumers it has provided. The recent advocacy program has had some fairly clear successes, and a few of those successes can be roughly quantified. We keep the quality high and the costs down through several means. Many of our comments build on the experience and information we have obtained in the course of our enforcement and other policy development work, such as workshops. Also, because we have been doing this for over 25 years, we have some experience in making the program work. When we do not have experience to build on in a particular area, we engage in research and evidence-gathering, so that we ensure that our advice is well-informed. We focus on areas where we can make multiple comments; we avoid areas that are too contentious for us to reach consensus within the agency; and we choose our battles carefully to focus on areas in which we have expertise and solid empirical evidence to undergird our position. And, finally, we share this important workload with the DOJ.

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[19] REPORT OF THE AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *in* 65 ANTITRUST AND TRADE REGULATION REPORT S-23 (Apr. 6, 1989). Previous qualitative evaluations of the advocacy program included work by Arnold Celnicker, who surveyed the recipients of state-level advocacy filings, finding that the comments were of value to the decision-making process. Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. L. UNIV. L. J. 379, 379-405 (1989). The FTC staff updated that survey about a year later with similar results.

[20] The total time on the program is on the order of 5 to 7 work years spread over 10 to 12 individuals in various components of the Commission, such as the Office of Policy Planning, the Bureau of Economics and the Office of the General Counsel, with help from other staff with expertise in specific topics. At the peak of the program, in the mid-1980s, the cost might have been closer to 4% of FTC resources. *See* Andrew J. Strenio, Jr., Press Release, FTC's Advocacy Program is Effective and Efficient (June 8, 1987).

V. Conclusion

There are always those who oppose competition and view it as an inappropriate means of "organizing" the production and distribution of goods and services. Indeed, on almost every issue on which we comment, there are those who find our advocacy positions vexing. More dangerous are those who profess to favor competition but want to chip away at it when it does not produce a particular result.[21] While it would be great if we could, through advocacy, convert those people, we must, regardless of our convert success, continue to stand up for the market. At a minimum, we should continue trying to convince the ultimate decision-makers to consider whether the cost of a proposed restriction outweighs its benefit. Over the years, we have been successful enough in this endeavor to demonstrate that the program is well worth the effort.

The FTC's advocacy program will continue to stand up for consumer interests and market-based competition whenever they are threatened by ill-advised government proposals. Although the outcomes may sometimes seem harsh on incumbent firms; as stated so aptly in a recent opinion piece, however, "living with competition is hard. Living without it would be harder."[22]

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[21] *E.g.*, Allocution de Monsieur Jacques Chirac, President of France (Jan. 4, 2005), *available at* http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXFV.html. President Chirac declares: "[L]et us favor competition. Not wild competition, which destabilizes whole fields and endangers economic sectors, but rather regulated competition, to give more purchasing and economic power to consumers." *Id* (translation).

[22] *See* Samuelson, *supra* note 6.